ANG MENG CHEY

v.

YAP BIAN TECK & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[CIVIL APPEAL NO: 12-26-2003-II]
3 MARCH 2005

CIVIL PROCEDURE: *Appeal - Decision of trial judge - Discretion exercised by trial judge - Apportionment of liability - Assessment of damages - Awarding of costs - Civil Law Act 1956, s. 7*

EVIDENCE: *Conflicting testimony - Road accident - Failure to consider evidence - Reference to disputed documents*

The plaintiff, the father of the deceased brought this action as the administrator of the deceased estate for dependency and damages arising out of a motor accident which occurred on 5 October 1996 at 10.30am along Jalan Sherif Masahor ("said accident"). The deceased was riding a motorcycle whilst the first defendant was driving a motorcar as the servant, agent and/or authorized driver of the second defendant. The plaintiff contended that the accident was caused solely by the negligence of the first defendant whilst the first defendant contended that the accident was caused wholly substantially and in part by the negligence of the deceased. After full trial, the learned Sessions Court Judge found the deceased to be 60% liable and the first defendant 40% liable for the said accident ("said decision"). This is the appellant/plaintiff's appeal against the said decision. The issues that arose were: (i) whether the learned judge erred in law and fact in arriving at his/her apportionment of liability; (ii) whether the learned judge erred in law and fact when he/she referred to exhs. D3 and D4 which were disputed documents; (iii) whether the learned judge erred in law and fact in not considering the evidence of PW8; (iv) whether the learned judge erred in law and fact in deciding that the motorcycle had come out of Lorong Hui Seng 6 despite there being evidence to the contrary given by PW10; (v) whether the learned judge erred in law and fact in finding that it was improbable for the motorcar to suddenly collide with the motorcycle due to the distance between the two and by failing to consider the undisputed fact that the deceased was knocked from the rear at great speed; (vi) whether the learned judge erred in law and fact in assessing the quantum of special/general damages; and (vii) whether the learned judge erred in law and fact in his/her finding for costs.

Held (appellant's appeal dismissed with costs to the respondent to be taxed unless agreed):

[1] Following the principles of law as enunciated in the case of *Jeremiah v. Lee Yew Kwai* [1996] 1 MLJ 59, I am not inclined to interfere with the learned Sessions Court judge's apportionment of liability as such apportionment was made based on her findings of fact based on the oral testimony of witnesses, the sketch plan and the damages sustained by the vehicles. (p. 25 c)

[2] I fail to see why the appellant should take issue with regards to exh. D3 and D4 as going by the court's notes of proceeding ("NOP"), they were tendered as defence exhibits and marked accordingly after identification by PW10, the recorder of D3 and D4 during his cross-examination. This court is bound to follow the NOP of the lower court as the correct version before this court as this court is only sitting in an appellate capacity. In any event, the learned Sessions Court Judge was not influenced by both these documents since throughout her assessment of her evidence with regards to the issue of liability, she merely referred to these two exhibits in her introduction when spelling out what the appellant and defendant's version as to the cause of the accident was. (pp. 25 h & 26 a)

[3] The learned Sessions Court Judge considered PW8's evidence and on the whole she found the evidence to be contradictory and she disbelieved it. (p. 26 e)

[4] The learned Sessions Court Judge was unaware of the evidence of PW10 and this is evident from her judgment at p. 79 of the Record of Appeal when she delineated the evidence adduced at trial. Having noted this, I find that the learned Sessions Court Judge had made the finding that "the deceased was primarily to be blamed for the accident for coming out of Lorong Hui Sing and cutting across the first defendant's right of way without keeping a proper look" by the evidence of PW9 before her. (p. 25 f-g)

[5] The slanting position of the motorcycle was more consistent with the first defendant's version which led the learned Sessions Court Judge to believe that the first defendant saw the motorcycle cutting from the left lane to the right lane towards the gap in the middle road divider wherein the deceased panicked and spontaneously braked violently which explained the brake marks but he failed to avoid the collision due to the high speed at which he was traveling. I do not find the basis for the learned Sessions Court Judge's assumption that there was ample distance between the two vehicles rendering it improbable and unreasonable for the motorcar to

collide with the motorcycle. To my mind, it is not an undisputed fact that the deceased was knocked from the rear as claimed by him: *Teng Ching Sin v. Leong Kwong Sun* [1994] 1 SLR 758. In relation to the speed of the motorcar, the learned Sessions Court Judge did not fail to consider this factor as apart from what has already been stated, she had borne this in mind as is evident from line 24 page till line 14 p. 84 of the Record of Appeal. (pp. 27 e-g & 28 c)

[6] I have perused the learned Sessions Court Judge's grounds of judgment on quantum of damages and I am not inclined to interfere with it. I agree that the learned Sessions Court Judge made a correct assessment based on what is a reasonable and fair amount of compensation being mindful of the principle case cited in *Pang Ah Chee v. Cheng Kwee Sang* [1985] 1 MLJ 153 which held that the court can take judicial notice of Chinese funeral expenses and the fact that such expenses are normally incurred and that the amount would vary according to the status of the deceased or such other matters which may be considered by the court. Further the learned Sessions Court Judge had seen the witnesses and had taken into account the absence of supporting receipts and the deceased's station in life. (p. 28 f-g)

[7] An appellate court should not interfere in the award of costs unless it can be shown that there has been an error of law or the purported exercise of discretion was based on grounds wholly unconnected with the cause of action: *Petroleum Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew* [1987] 1 MLJ 25. (p. 29 e)

Case(s) referred to:

Jeremiah v. Lee Yew Kwai [1966] 1 MLJ 59 PC ***(refd)***
Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v. Cheah Kam Chiew [1992] 1 MLJ 147 SC ***(refd)***
Pang Ah Chee v. Cheng Kwee Sang [1985] 1 MLJ 153 ***(refd)***
Petroleum Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew [1987] 1 MLJ 25 SC ***(foll)***
Rashidi Partorjo v. Frederick Kiai [1976] 2 MLJ 214 FC ***(refd)***
Teng Ching Sin v. Leong Kwong Sun [1994] 1 SLR 758 ***(dist)***
Yahaya Mohamad v. Chin Tuan Nam [1975] 2 MLJ 117 PC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 7
Subordinate Courts Rules 1980, O. 48 r. 2

For the appellant/plaintiff - Albert Litor; M/s Idris & Co
For the respondents/defendants - June Chan; M/s Liew

Reported by Sharmini Pillai

JUDGMENT

Lau Bee Lan J:

This is the appellant/plaintiffs ("the plaintiff) appeal against the whole of the decision of the learned Sessions Court Judge after a full trial given on 16 May 2003. The grounds of appeal as per the Memorandum of Appeal is as follows:

(1) The learned judge erred in law and in fact when the learned judge found the deceased to be 60% and the 1st defendant/respondent 40% liable for the accident.

(2) The learned judge erred in law and in fact when the learned judge referred to the disputed documents in D3 at p. 4 of the defendant's bundle marked as DB. The document is disputed as to contents and authencity and was not marked as an exhibit. The defendants did not tender the said document as an exhibit. The maker of the statement of the said document was not called to testify and/or as a witness in the said case, [the appellant will refer to p. 2 line 1 of the notes of proceedings].

(3) The learned judge erred in law and in fact when the learned judge referred to another disputed document in D4 at p. 9 of the defendant's bundle marked as DB. The said document is disputed as to contents and authencity and was not tendered by the defendant as an exhibit. The maker of the said statement in the said document was not called to testify and/or as a witness in the said case, [the appellant will refer to p. 2 line 1 of the notes of proceedings].

(4) The learned judge erred in law and in fact in failing to consider the testimony and/or evidence of PW8, the only eyewitness at the said accident who was called to give evidence. PW8 gave evidence as to how the accident had happened.

(5) The learned judge erred in law and in fact when the learned judge in her judgment at p. 4 line 25 to 26 considered "that PW10 agreed from this statement the motorcycle was coming out of from Lorong Hui Sing 6" when PW10 [at p. 28 line 7 to 12 of the notes of proceedings] had earlier in his testimony and / or evidence had disagreed that the motorcyclist was coming out from Lorong Hui Sing 6. The maker of the statement was not called to give evidence in respect of the said accident.

(6) The learned judge erred in law and in fact when the learned judge assumed that the ample distance between the motorcycle and the motorcar renders it improbable for the motorcar to suddenly collide with the

motorcycle. The learned judge erred in fact and/or in law when the learned judge failed to consider the speed of the motorcar and the motorcycle in the said accident.

(7) The learned judge erred in law and/or in fact in the finding of fact in respect of the liabilities of the parties.

(8) The learned judge erred in law and/or in fact when the learned judge failed to consider the undisputed fact that the deceased was knocked from the rear at great speed.

(9) The learned judge erred in law and/or in fact when the learned judge erred in assessing the quantum of damages in particular the special and/or general damages. The witnesses had attended in court to give evidence of the expenditure in respect of the special damages claimed by the defendant.

(10) The learned judge erred in law and/or fact in the learned judge finding as to costs.

The brief facts are as follows. The plaintiff, the father of the deceased is bringing this action as the administrator of the estate of the deceased pursuant to s. 7 of the Civil Law Act for dependency and for damages arising from an accident along Jalan Sherif Masahor leading towards Hui Sing Gyratory which occurred on 5 October 1996 at about 10.30am. At the material time of the accident, the deceased was the rider of motorcycle bearing plate no. 7D883Q carrying a pillion rider, Seliman ak Umai (PW8). The 1st defendant, Yap Bian Teck is the driver of motorcar bearing registration no. KP221Q as servant, agent or/or authorised driver of the 2nd defendant; M/s. Yu Lee Hong Motors Sdn. Bhd. It is the plaintiff's contention that the accident was caused solely by the negligence of the 1st defendant as particularised in the statement of claim whilst the defendants dispute this contention and aver that the accident was caused wholly, substantially or in part by the negligence of the deceased.

The court has considered the written submissions of both the learned counsel for the plaintiff, Mr. Albert Litor (however at the lower court, Mr. Roland Thomas acted as counsel) and Miss June Chan, counsel for the defendants (represented by Ms. Florence Lisu before the the lower court). To avoid any repetition, I shall deal with the Grounds of Appeal as referred to hereinbefore but not necessarily in the order seriatim.

Ground 1

This ground revolves on the question of deciding what is the right apportionment of liability. As pointed out earlier, it is the plaintiff's contention that the defendant should be 100% liable. Learned counsel for the defendants has highlighted to the court the case of *Jeremiah v. Lee Yew Kwai* [1966] 1 MLJ 59 (Privy Council); *Yahaya bin Mohamad v. Chin Tuan Nam* [1975] 2 MLJ 117 (Privy Council) and *Rashidi bin Partorjo v. Frederick Kiai* [1976] 2 MLJ 214 (Federal Court). Basically by virtue of these cases, the court is reminded that it is trite law that it would be wrong for the appellate court which has not seen or heard the witnesses to substitute its own finding of fact for that of the learned trial judge (see Headnote 1 in *Rashidi bin Partorjo* (*ibid*)).

It is to be noted at the outset of her assessment of the evidence, the learned Sessions Court Judge was conscious of the fact that the defendants did not offer any evidence; instead of drawing an adverse inference against them for failing to adduce evidence she elected to consider the oral evidence and the neutral evidence in arriving at her finding of liability premised on the authority of *Che Pah bte Itan v. Chang Bek Lee* (Civil Appeal No. 12-74-1989) Mallal's Digest vol. 11 (Road Traffic) (4th edn.).

It is highly evident that in her finding of liability, the learned Sessions Court Judge had to consider the credibility of the witnesses who testified before her *vis-a-vis* the sketch-plan (exh. P7) and the damages which occurred to the motorcycle and motorcar driven by the deceased and the 1st defendant respectively.

The learned Sessions Court Judge had made observations regarding the credibility of the witnesses she had seen and heard. Firstly, the learned Sessions Court Judge determined whether the motorcycle had already crossed into the right lane when the motorcar driven by the 1st defendant knocked into it. In this connection, she referred to the sketch plan (exh. D7), the oral testimony of PW9, Sergeant Teo Chak Swee, the author of the sketch plan, and PW10, Inspector Hanyan Ramlan the I.O. of the case, and the damages to the respective vehicles. Thereafter she concluded "After taking into account that the motor car was at all material times keeping a straight course and its final resting position, the damages sustained by the vehicles, the position of the scratch mark in relation to the motor car, I am led to believe that at the time of the accident, the motorcycle was already in the right lane and that it was in slanting position. The point of impact as indicated by PW9 shows that it was in the right lane".

The learned Sessions Court Judge further opined "I have no reason to disbelieve PW9's evidence on this and I accept that the point of impact was in the right lane very close to the middle broken line and near the gap in the divider as denoted by the (x) in blue ink in the sketch plan (P7)".

The learned Sessions Court Judge next considered why she found the motorcycle was in a slanting position. Again after reviewing the sketch plan and the evidence of PW8, Seliman ak Umai, the pillion rider, she concluded that she disbelieved PW8's evidence for the reasons as set out by her in line 10 to 33, p. 32 to line 5 at p. 33 of the Record of Appeal.

Therefore, following the principles of law enunciated in *Jeremiah*, *Yahaya bin Mohamad & Rashidi* (*supra*), I am not incline to interfere with the learned Sessions Court Judge's apportionment of liability as such apportionment was made on the basis of her findings of facts based on the oral testimony of witnesses, the sketch plan and the damages sustained by the vehicles.

Grounds 2 and 3

Basically, the appellant's grouse is that the learned Sessions Court Judge has erred in referring to exh. D3 the statement of Theng Lian Fat, the co-passenger in the vehicle driven by the 1st defendant and exh. D4, the statement of Yap Bian Teck, the 1st defendant who is the driver of the motor vehicle which collided with the deceased's motorcycle.

It is to be noted that both the counsel for the appellant and defendants at the appellate stage are not the same counsel having conduct of the trial before the lower court. Therefore, during clarification stage on 26 January 2005, the court had to satisfy itself as to the whereabouts of exhs. D3 and D4. Mr. Albert Litor had informed the court that exh. D3 was never tendered in the lower court whilst exh. D4 constituted pp. 308 to 310 of the Record of Appeal. Ms. June Chan took objection to the inclusion of exh. D4 (pp 308 - 310) which were missing from the Record of Appeal at this stage.

I had to verify with the original docket of the relevant court below and had made copies of, *inter alia*, exhs. D3 and D4 which were extended to both the learned counsel.

I fail to see why the appellant should take issue regarding exh. D3 and exh. D4 because going by the court's notes of proceeding, they were tendered as defence exhibits (because they are marked as 'D') and marked accordingly after identification by PW10, the recorder of D3 and D4 during the stage of his cross-examination. This court is bound to follow the court's notes of proceeding of the lower court as the correct version before this court since this court is only sitting in an appellate capacity.

Be that as it may, it was correctly pointed out by Miss Chan that in her finding on liability, the learned Sessions Court Judge was not influenced by both these documents since throughout her assessment of her evidence with regard to the issue of liability, she merely referred to exh. D3 and exh. D4 in her introduction when spelling out what the appellant's and defendants' version as to the cause of the accident was. I am fortified in my view as the learned Sessions Court Judge said:

> The version of accident according to the plaintiff is that it happened when the deceased attempted to overtake a car in front. From the questions posed during cross-examination by the learned counsel for the defendants, and according to the police report and statements (D3 and D4) made by the passenger of the motor-car, Then Lian Fat and the 1st defendant, the accident happened when the deceased was coming out from Lorong Hui Sing 6 and cutting across the left lane into the gap in the divider.

In my view, the learned Sessions Court Judge was purely laying the premise and she has not made her finding on liability because subsequently she stated, "I will consider the oral evidence as well as the neutral evidence adduced in the trial to make a finding on liability".

Ground 4

I find that this ground is baseless because it is evident that the learned Sessions Court Judge considered PW8's evidence from line 20 to 29 at p. 80 of the Record of Appeal and again from line 10, p. 82 to line 5 at p. 83 and at line 3 to 5 at p. 84 and on the whole, she found the evidence to be contradictory and she disbelieved the evidence. In this regard, the matters which I had addressed in respect of ground 1 with reference to PW8 would apply.

Ground 5

The learned Sessions Court Judge was not unaware of the evidence of PW10 at p. 4 line 25 to 26 and at p. 28 lines 7 to 12 as pointed by the plaintiff. This is especially evident from her judgment at p. 79 of the Record of appeal at line 15 to line 31 when she delineated the evidence adduced at the trial. Having noted this, I find that the learned Sessions Court Judge had made the finding that "the deceased was primarily to be blamed for the accident for coming out from Lorong Hui Sing and cutting across the 1st defendant's right of way without keeping a proper look" by other material before her. The material evidence are:

> (1) I have no reason to disbelieve PW9's evidence on this (ie, the point of impact as indicated by PW9) and **I accept that the point of impact was in the right lane very close to the middle broken line and near the gap in the divider as denoted by the (x) in blue ink in the sketch plan (P7**).

(2) Although **I find that the deceased had ridden his motorcycle in an irresponsible manner by cutting across the 1st defendant's right of way into the gap in the divider when it is illegal for him to do so and without keeping a proper** *look out* for the traffic on said road, the 1st defendant was not without blame.

(Emphasis added)

The evidence which I have alluded to above is gathered from the testimony of PW9.

Grounds 6 And 8

These two grounds will be dealt together as they are linked.

It is PW8's evidence in chief that the motorcycle was travelling behind a car in front for sometime at the speed of 40 km. p.h. The said car braked gradually and the deceased swerved to take the right lane and in so doing had put his right signal light indicator. PW8 stated that he looked behind and saw that the right lane was clear. However, the learned Sessions Court Judge disbelieved PW8 because of her explanation on the brake marks E1 - E2 measuring 35.60 meters caused by the motorcar as depicted in the sketch plan (exh. P7), the slanting position and the resting position of the motorcycle at the time of the collision. As pointed out by the learned Sessions Court Judge the slanting position of the motorcycle is more consistent with the 1st defendant's version which led her to believe that the 1st defendant saw the motorcycle was cutting from the left lane to the right lane towards the gap in the middle road divider wherein he panicked and spontaneously braked violently which explains the presence of the brake marks but he failed to avoid the collision due to the high speed he was travelling estimated to be in the region of more than 80 km. p.h.

Further, I do not find the basis of the learned Sessions Court Judge's assumption that there is ample distance between the motorcycle and the motorcar rendering it improbable for the latter to collide with the former unreasonable. She had arrived at that conclusion after having considered the length of the brake marks *vis-a-vis* the body length of a saloon car at about 4 meters, the brake marks of 35.60 meters is approximately 8 to 9 cars length which when added to the distance of first sighting of the motorcyclist by the 1st defendant (which is before E1). Therefore, to my mind, with due respect to the learned counsel for the plaintiff, it is not an undisputed fact that the deceased was knocked from the rear as claimed by him.

The case of *Teng Ching Sin v. Leong Kwong Sun* [1994] 1 SLR 758, Court of Appeal, Singapore, Mallal's Digest 1994 which the plaintiff relies upon to submit that the 1st defendant bears the responsibility in avoiding the motorcycle in front rests more heavily on him since he was travelling behind the motorcycle is inapplicable. This is because it is the learned Sessions Court Judge's finding that the motorcar driven by the 1st defendant was travelling on its right of way whilst it was the deceased who attempted to cut across from the left lane to the right.

In relation to speed of the motorcar and motorcycle, the learned Sessions Court Judge did not fail to consider the factor, because apart from what I have stated earlier, she had borne this in mind as is evident from line 24 p. 83 till line 14 p. 84 of the Record of Appeal. Therefore, the abovesaid grounds of appeal is without substance.

Ground 9

I accept the learned counsel for the 1st defendant's submission that the plaintiff's written submission on quantum at p. 20 to 31 on loss of support/ dependency claim and on general damages for pain and suffering from pp. 37 to 38, reasonable expenses at p. 31 and property damages on p. 36 ought to be disregarded as they do not constitute the grounds of appeal. The plaintiff has merely complained carte blanche that the learned Sessions Court Judge had erred in assessing the quantum of damages in particular the special damages without going into particulars.

I have perused the learned Sessions Court Judge's grounds of judgment on quantum of damages and I am not inclined to interfere with it. I agree with the learned counsel for the 1st defendant that the learned Sessions Court Judge made a correct assessment based on what is a reasonable and fair amount of compensation being mindful of the principle case cited in *Pang Ah Chee v. Cheng Kwee Sang* [1985] 1 MLJ 153 which held that the court can take judicial notice of Chinese funeral expenses and the fact that such expenses are normally incurred and the amount would vary according to the status of the deceased or such other matters which may be considered by the court. Further, the learned Sessions Court Judge had seen the witnesses and had taken into account the absence of supporting receipts and the deceased's station in life.

Ground 10

In respect of costs, learned counsel for the 1st defendant drew the court's attention to some statutory provisions and cases. It has been drawn to the court's attention that the power of the subordinate courts toward costs is derived from para. 15 of the third schedule of the Subordinate Courts Act 1948 (Act 92) which provides:

> Power to award costs of any proceedings including proceedings which have been stayed and proceedings beyond its jurisdiction; all such costs to be in the discretion of the court, save as by any written law provided.

Order 48 r. 2 of the Subordinate Courts Rules 1980 stipulates:

> 2. Subject to the express provisions of any written law and of these rules, the costs of and incidental to proceedings in a court shall be in the discretion of the court and the court shall have full power to determine by whom and to what extent the costs are to be paid.

In *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Cheah Kam Chiew* [1992] 1 MLJ 147 the Supreme Court held that the question of costs to be awarded in any particular case depends on the discretion of the judge and which must be exercised according to settled principles. Further, in *Petroleum Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew* [1987] 1 MLJ 25 the Supreme Court held at p. 26 that an appellate court does not interfere in the question of costs without reluctance. This is because the court below has an absolute discretion except that the discretion must be exercised judicially. An appellate court should not interfere unless it can be shown that there has been an error of law or the purported exercise of discretion was based on grounds wholly unconnected with the cause of action.

I repeat what I have stated with respect to the learned Sessions Court Judge's assessment on quantum of damages (see comment in relation to ground 9). In relation to her summary of awards, the learned Sessions Court Judge had stated "The above awards are made on 100% liability ... Each party will bear their respective costs". Thus, having apportioned the liability between the deceased and the 1st defendant as 60:40, the percentage of the cost to be borne by the parties would follow accordingly.

In the circumstances, for the reasons aforesaid, I find that there is no merit in the appellant's appeal and I hereby dismiss the appeal with costs here and below to be given to the respondents to be taxed unless otherwise agreed.